IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL J. CIOCCO and KAREN L. CIOCCO, husband and wife, and the marital community composed thereof, and SHEPHERD ABBOTT CARTER, Appellants, v. FUMIO DOUGLAS IKEGAMI and PATRICIA IKEGAMI, husband and wife, and the marital community composed thereof, and ADZAM, INC., a Washington corporation d/b/a Doug's Lynnwood Mazda, Respondents.	)	No. 61817-2-I (consolidated w/62182-3) DIVISION ONE UNPUBLISHED OPINION FILED: May 3, 2010

BECKER, J. — Appellant Michael Ciocco filed a lawsuit claiming that he was still owed money by the car dealership where he used to work. In a bench trial, the court ruled for the defendant at the end of the plaintiff's case and then ordered Ciocco to pay more than $600,000 in attorney fees for a frivolous action. We reverse the award of attorney fees because at least one component of the action, Ciocco's claim for breach of employment contract, was not frivolous.

We also reverse an order imposing attorney fees as terms upon plaintiff's

counsel for a mishap in transmission of working copies that caused a delay in the trial. The award of attorney fees was not authorized by statute or rule, and it cannot be upheld as an exercise of the court's inherent authority to control litigation because there was no finding of bad faith misconduct and no basis for such a finding.

FACTS

Michael Ciocco is a car salesman. In May 1996 he went to work at a Lynnwood car dealership owned by Doug Ikegami and became the manager at that location. Starting around July 1999, Ciocco also managed a second location, Doug's in Everett. Ikegami paid Ciocco 30 percent of the net profits from the dealership in Lynnwood. In 1999 the percentage went up to 40 percent of the profits from the two locations. Ciocco was paid over $8 million during the eight years that he was associated with Ikegami.

In May 2004, Ciocco quit. Ciocco sued Ikegami's corporation on August 19, 2004. He alleged that he and Ikegami had an oral partnership agreement, or alternatively an employment agreement, that Ikegami had breached in various ways. Ikegami moved for summary judgment. His motion focused primarily on the reasons to dismiss Ciocco's partnership claim.

On February 22, 2008, Judge James H. Allendoerfer heard argument on the summary judgment motion and dismissed the partnership claim. On March 3, 2008, Ciocco moved for reconsideration of the partial summary judgment

ruling.

On March 10, 2008, while the motion for reconsideration was still pending before Judge Allendoerfer, Judge Richard J. Thorpe began presiding over a bench trial of Ciocco's remaining claims. During the lunch recess on the first day of trial, the parties learned that Judge Allendoerfer had granted Ciocco's motion to reconsider and had decided to reinstate the partnership claim. Accordingly, the parties went to trial on both of Ciocco's primary theories: partnership, or in the alternative, breach of employment contract.

Ikegami moved for judgment as a matter of law under CR 41(b)(3) at the conclusion of Ciocco's case-in-chief. After hearing argument, Judge Thorpe granted the motion and dismissed all of Ciocco's claims in an order dated May 27, 2008.

ATTORNEY FEE AWARD FOR FRIVOLOUS ACTION

Ikegami moved for attorney fees under RCW 4.84.185. Ciocco responded that his claims were not frivolous because his own testimony provided a basis on which the trial court could have ruled in his favor.

On June 9, 2008, Judge Thorpe entered an order finding that all claims were frivolous and advanced without reasonable cause and granting Ikegami's motion for attorney fees and costs. After a hearing on the reasonableness of the fees requested, Judge Thorpe entered judgment against Ciocco for $634,267.23.

Ciocco appeals the trial court's finding that his action was frivolous. He does not appeal the judgment dismissing his case.

Our review under RCW 4.84.185 is for abuse of discretion. Tiger Oil Corp. v. Dep't of Licensing, 88 Wn. App. 925, 937-38, 946 P.2d 1235 (1997). This statute allows for recovery of attorney fees and costs for the prevailing party when an action was "frivolous and advanced without reasonable cause." An action is frivolous if, when viewed in its entirety, it cannot be supported by any rational argument on the law or the facts. Truong v. Allstate Prop. & Cas. Ins. Co., 151 Wn. App. 195, 202, 207, 211 P.3d 430 (2009); Tiger Oil Corp., 88 Wn. App. at 938. "The action or lawsuit is to be interpreted as a whole." Biggs v. Vail, 119 Wn.2d 129, 136, 830 P.2d 350 (1992). Where three of four claims are judged to be frivolous but the fourth claim is not, the action as a whole is not frivolous and it is improper to grant attorney fees under RCW 4.84.185. Biggs, 119 Wn.2d at 137.

Ciocco does not attempt to defend the partnership claim against the finding that it was frivolous. He attacks only the court's finding that the claim for breach of an employment agreement was frivolous.

Ciocco's complaint alleged that Ikegami had breached the employment agreement by failing to pay him "buy fees" of $250 for each vehicle that Ciocco purchased as inventory for the two stores. At trial, Ikegami testified that he agreed to pay Ciocco a percentage of the buy fees, and did in fact pay him 40

percent of the buy fees during the three years before he quit. Ciocco contends that he had a rational basis for claiming that Ikegami still owed him the percentage of buy fees he earned during the first five years of his employment.

To argue that the buy-fee claim was frivolous, Ikegami relies heavily on the unchallenged findings of fact entered by the trial court in support of the judgment of dismissal. The trial court found as follows: Ciocco was at all times an at-will employee. The terms of his employment, based on "a partially oral contract" between himself and Ikegami, changed slightly over time. At first he was paid 30 percent of net sales for managing the Lynnwood location. The percentage increased to 40 percent when he took on the Everett location as well. There was "no credible evidence" as to the exact terms of Ciocco's employment contract, "such as the allocation of any given business expense or the allocation of buy fee revenue." Ciocco and Ikegami had no agreement regarding the terms of splitting buy fees until sometime in 2000 or 2001. At that time, Ciocco was told that the terms of his employment agreement entitled him to 40 percent of the buy fees. After learning that he was not entitled to 100 percent of the buy fees, Ciocco continued to work for Ikegami and to accept payment of 40 percent of the buy fees on a monthly basis. Ciocco received all of the compensation to which he was entitled under his employment contract.

Based on the findings summarized above, the court concluded that Ciocco failed to prove that there were any terms of his contract that had been

breached; even if there were a breach, Ciocco failed to prove damages; and even if there were a breach and damages, the claim was barred by the three year statute of limitations because no breach occurred less than three years before suit was filed in August 2004.

Ikegami contends that substantial evidence supports the court's findings, and that two of them in particular demonstrate that it was frivolous for Ciocco to claim he was entitled to buy fees from the beginning—the finding that there was no credible evidence of an agreement about the allocation of buy fee revenue and the finding that until 2000 or 2001, there was no agreement at all about splitting buy fees. The findings are indeed supported by substantial evidence. They explain why Ciocco did not prevail. But to explain why Ciocco lost at trial does not establish that he lacked a rational basis for claiming he was entitled to buy fees throughout the period of his employment. At trial, Ciocco testified that buy fees were a fee of $150 (not $250, as alleged in his complaint) paid to the person who bought the used cars for the dealership. He said that Ikegami agreed to pay him 100 percent of the buy fees for taking over the responsibilities of buying the cars. For the first four years of his employment, he did not receive any portion of the buy fees; but he said he did not complain because he understood his buy fees were being accumulated in a reserve account. After four years, he learned the account was empty:

> I never took payment from the buy-fee account for the first, it has got to be, at least, four years. I was making enough money, I didn't need it. I was just saving it up. I just figured we would have a

> pretty nice payment down the road. And when I went to get the money and finally wanted the money, it was gone . . . .
>
> Q. How did you find out that the reserve account had none of the buy-fees?
>
> A. Well, talking to Pat Larson [Ikegami's bookkeeper] -- I wanted to get paid on it, and I needed an accounting of it. And the accounting I got was that there was nothing left.
> . . . .
> A. . . . I was very upset, and I talked to [Ikegami] about where did the money go, and I understood that . . . Hyundai Motor Company had fined him a hundred thousand dollars and that's where the money came from, and I said: What do I have to do with that? And he said: The money was in -- we are partners in this thing, that's where the money went. And so I accepted it.[1]

Ciocco testified that after this discovery, he requested monthly payments of his buy fees, but did not request payment of the past-due buy fees, assuming they would be his partnership buy-in:

> Q. After that conversation with Mr. Ikegami, other than asking that your buy fees be paid to you monthly, did you ask that the buy fees that were missing be paid to you?
>
> A. Not after that conversation, no.
>
> Q. Why not?
>
> A. They were going to be my investment into the company - - or they were my investment into the company.
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> Q. Why did you believe that those funds that had been taken out by Mr. Ikegami were to be your investment in the company?
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> A. That's what Mr. Ikegami told me.
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> Q. If you had believed from that point on that those funds that you were still an employee, would you have demanded that those funds

[1] Report of Proceedings (March 12, 2008) at 67-68.

be paid to you?

A. Yes.[2]

In contrast to Ciocco, Ikegami testified that the buy fees were a charge his company put on every used car and that the corporation put the money into a reserve account "to take care of unexpected expenses." Ikegami said he had an agreement to pay Ciocco a percentage of the buy fees on a monthly basis, but it was never 100 percent; it was 30 percent at first and 40 percent later. Ciocco maintained that he was due 100 percent of the buy fees:

Q. Yeah. The original deal was 30 percent, right?

A. Not of the buy fees.

Q. Oh, It's your position that you were entitled to all of the buy fees?

A. That's what it was.

Q. Is there any -- is that in writing anywhere?

A. Just conversations. . . .
. . . .

A. The buy fees were always supposed to be mine. They were always supposed to be mine.[3]

The trial court disbelieved Ciocco's testimony about the percentage of buy fees he was supposed to receive. But we are aware of no authority supporting a holding that a case becomes frivolous when a trial judge finds the only testimony supporting it to be unworthy of belief. Ciocco's testimony

[2] Report of Proceedings (March 12, 2008) at 161-62.
[3] Report of Proceedings (March 14, 2008) at 40-41.

supplied a factual basis for arguing that first, he was always entitled to receive 100 percent of the buy fees and second, even if he was entitled to receive only a lesser percentage, he did not get paid any percentage at all for the first four years. Thus, it was not frivolous for Ciocco to argue breach of an employment agreement.

Ikegami next argues that even if Ciocco could prove a breach, his proof of damages was entirely speculative. We disagree. Ciocco testified that a buy fee was to be paid on each car that he acquired for inventory. He claimed that he did almost all the buying, estimating that no more than ten percent of the cars were bought by Ikegami or other individuals. He testified as to the exact number of cars bought each year.[4] This testimony is sufficiently certain to support a rational argument for proof of damages for breach of the agreement. See, e.g., Lewis River Golf, Inc. v. O.M. Scott & Sons, 120 Wn.2d 712, 718, 845 P.2d 987 (1993) (compensatory damages are often at best approximate). Thus, it was not frivolous for Ciocco to argue damages.

Ikegami next argues that even if the court could have believed Ciocco's version of the facts establishing breach and damages, under the law it was frivolous for him to contend that he was entitled to receive any more of the buy fees than he actually did receive. Ikegami maintains that after Ciocco was told in approximately 2001 that henceforth he would receive only 40 percent of the

[4] Report of Proceedings (March 12, 2008) at 85-86.

buy fees, he acquiesced to the changed terms by continuing to work for Ikegami without further objection. This argument was the principal reason Ikegami advanced below in arguing that the breach of employment claim was frivolous.[5] The argument is based on the principle that an employer may unilaterally alter or amend the terms and conditions of employment if an employer gives the employees reasonable notice of the change and the employee continues working. Gaglidari v. Denny's Restaurants, Inc., 117 Wn.2d 426, 434, 815 P.2d 1362 (1991).

Assuming the validity of Ikegami's application of Gaglidari, Ciocco's acquiescence after 2001 does not explain why it was frivolous for him to argue that Ikegami breached their agreement by failing to pay him the portion of the buy fees that he earned before 2001. There is no basis to believe, and Ikegami does not argue, that any contract modification in 2001 could retrospectively change the terms of the oral contract that existed between 1996 and 2001.

Ikegami contends that even if Ikegami had a claim for those pre-2001 unpaid buy fees, he should have known that it was time barred by the time he brought suit. See RCW 4.16.080 (three year statute of limitations for an action upon a contract, express or implied, "which is not in writing, and does not arise out of any written instrument"). Ikegami did not present this argument in his motion for attorney fees, but the record below reflects that the parties debated

[5] Clerk's Papers at 3177-78 (Defendant's Motion for Reasonable Attorneys' Fees and Costs Under RCW 4.84.185 and Civil Rule 11).

statute of limitations issues in connection with Ikegami's motion for summary judgment that was denied by Judge Allendoerfer.

Ikegami argued that the three-year statute applied, not the six-year statute, because any contract that might be proved was partly oral. Accordingly, Ikegami asked the court to limit Ciocco's claims to only those allegations and damages for breach that arose after August 19, 2001 (three years before filing of the lawsuit).[6]

Ciocco responded to this portion of the motion for summary judgment in part by contending that he was working under a contract for continuous service. He quoted Macchia v. Salvino, 64 Wn.2d 951, 955, 395 P.2d 177 (1964): "'[T]he statute of limitations on amounts due under a contract for continuous service does not begin to run until the contract is terminated.'"[7] On appeal, Ciocco contends that Macchia supplied a rational basis for arguing that the statute of limitations did not bar his claim for unpaid pre-2001 buy fees. We agree. Ikegami argues on appeal that Macchia is distinguishable because the change of terms from 30 percent to 40 percent meant that Ciocco did not have a contract for continuous service. But this is a debatable issue. Based on Macchia, Ciocco could rationally argue that the statute of limitations did not begin to run on his claim for unpaid buy fees until he quit. Since he filed suit only three months

[6] Clerk's Papers at 2752-53 (Defendant's Motion for Summary Judgment, p. 19-20.)

[7] Clerk's Papers at 2431-33 (Plaintiff Ciocco's Response to Defendant's Motion for Summary Judgment, p. 8-10) (alteration in original).

after quitting, it was not frivolous for him to argue that his claim was not time barred.

We conclude Ciocco had a rational basis for advancing a claim that Ikegami breached an employment agreement by promising him a percentage of the buy fees but failing to pay them for at least four years. Because Ciocco's claim for breach of an employment contract was not frivolous, his suit against Ikegami was not frivolous in its entirety. The judgment against Ciocco for $634,267.23 in attorney fees must be reversed.

ORDER IMPOSING TERMS

The second issue presented in this appeal concerns an award of $12,020 in attorney fees imposed by Judge Allendoerfer as "terms" against counsel for Ciocco.

The hearing on Ikegami's motion for summary judgment was set to occur on February 22, 2008. Douglas Shepherd, Ciocco's lawyer, faxed his responsive documents to the superior court on February 11, 2008. Shepherd also mailed working copies for the judge. The working copies arrived at the superior court at 12:27 P.M. on February 20, 2008, but they did not reach Judge Allendoerfer in time for the hearing. Judge Allendoerfer explained this to the parties during a hearing that occurred on March 11.[8]

There are rules of procedure concerning delivery of working copies to the

[8] Clerk's Papers at 3101-13.

court. CR 56(c) states that the party opposing a motion for summary judgment "may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing." A local Snohomish County court rule provides that working copies of the motion and all documents in support or opposition "shall be delivered by the party filing such documents to the judicial officer who is to consider the motion no later than the day they are to be served on all other parties." SCLR 7(b)(2)(E).

Under the local rule, Shepherd should have provided his working copies to Judge Allendoerfer no later than 11 days before trial. His fax transmission of the documents did not comply with the rule because GR 17(5) provides that "facsimile transmission is not authorized for judge's working copies (courtesy copies)." Shepherd mailed the courtesy copies, but they were not received until February 20. According to declarations Shepherd filed later, he was prepared to mail the documents earlier but was unable to determine which judge was assigned to hear the motion. In any event, when Judge Allendoerfer heard argument on the motion for summary judgment on February 22, 2008, he did have Shepherd's brief before him, but he did not have the declarations supporting it.

The record does not include a transcript of the summary judgment hearing. In the March 10, 2008 order granting reconsideration, Judge Allendoerfer states that Shepherd was advised at the summary judgment hearing

on February 22 that the judge had not received the working copies, but Shepherd "elected to proceed ahead anyway."[9] The judge stated that he had made the decision to grant partial summary judgment without the benefit of the supporting declarations. And when he reviewed the supporting declarations in the court file, he found disputed issues of material fact. On March 10, Judge Allendoerfer reinstated the claims previously dismissed on summary judgment. The order stated that Ikegami would be permitted to seek terms for costs incurred due to the delay.

Ikegami immediately moved to have Judge Allendoerfer reconsider his order granting reconsideration. Judge Allendoerfer heard the motion on March 11, but did not change the order granted on March 10. The minute entry for March 11 states that the court "did not wish the parties to suffer because of a procedural issue and chose to have a full and fair trial on the merits. . . . The court understands that this puts the defendant at a disadvantage. The court will issue terms against the plaintiff should defendant request it."[10] Several times during the March 11 hearing, the judge referred to Shepherd's rule violation as a procedural "glitch."[11]

After the trial ended, Ikegami accepted the court's invitation to move for terms. In the motion, filed on April 7, 2008, Ikegami requested $32,755 in terms.

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[9] Clerk's Papers at 3093 (Order Granting Motion for Reconsideration).

[10] Clerk's Papers at 3139.

[11] Clerk's Papers at 3111, 3113 (March 11, 2008 Transcript of Proceedings, Motion for Reconsideration Hearing).

He asserted that the basis for such an award was the court's inherent authority to control litigation in its courtroom, citing State v. S.H., 102 Wn. App. 468, 473, 8 P.3d 1058 (2000). The motion did not identify any other basis for an award of attorney fees. Ikegami asserted that terms were warranted because "counsel's failure to follow the Court's rules and procedures amounts to improper litigation conduct, which not only delayed and disrupted the proceedings but also increased the cost of litigation."[12]

In a declaration filed on April 18, Shepherd opposed the award of terms. He noted the holding in S.H. that a sanction imposed under inherent authority requires a finding of bad faith. He asserted that the court did not inform him at the February 22 hearing that the court had not received working copies in time to review them.[13] Ikegami replied that Shepherd's recollection of the February 22 hearing was inaccurate, noting that Judge Allendoerfer's March 10 order specifically said that Shepherd was informed that the working copies were untimely. Ikegami argued that in any event, terms were warranted based on counsel's "inability to follow the court's rules."[14]

Judge Allendoerfer granted the motion for terms in a letter ruling dated April 18, 2008. His letter stated that Shepherd's "untimely response" was a violation of GR 17 and CR 56, but he did not invoke the court's inherent

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[12] Clerk's Papers at 3123 (Defendant's Motion for Terms).

[13] Clerk's Papers at 3059 (Declaration of Douglas R. Shepherd Regarding Sanctions).

[14] Clerk's Papers at 3056 (Defendants' Reply in Support of Their Motion for Terms).

authority nor did he identify a statute or rule authorizing an award of terms for these violations. He made no finding of bad faith or conduct undertaken for improper purposes. The judge's letter expressed irritation at Shepherd for trying to reconstruct what was said at the hearing of February 22 and thereby to avoid responsibility for the late transmission of the documents: "This pattern of denial and 'spinning' of the facts is not a professional approach to the pending motion." The judge also ordered Ikegami to pare down the requested fees.[15]

The final order on the motion for terms, entered June 3, 2008, awarded Ikegami $12,020 for the extra attorney fees and expenses incurred as a result of the need to reprepare for trial on the partnership issues after the summary judgment ruling was retracted. The order stated that the court found it "disturbing" that Shepherd was still in denial relating to his role in the rule violations. The order also scolded Ikegami for failing to provide a helpful analysis of attorney fees.[16]

Shepherd's law firm appeals from the award of terms. We review for abuse of discretion. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993); S.H., 102 Wn. App. at 473. A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law. Fisons, 122 Wn.2d at 339.

The general rule is that attorney fees cannot be awarded absent a

[15] Clerk's Papers at 3049 (April 22, 2008 letter ruling).
[16] Clerk's Papers at 3041-43 (Order Granting Defendants' Motion for Terms).

contract, statute, or recognized ground of equity. Haner v. Quincy Farm Chems., Inc., 97 Wn.2d 753, 757, 649 P.2d 828 (1982). Court rules specifically authorize an award of attorney fees in certain situations for conduct that causes litigation delay. For example, CR 37(b)(2) expressly authorizes an award of attorney fees for a violation of the rules relating to discovery. Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002); Burnet v. Spokane Ambulance, 131 Wn.2d 484, 497, 933 P.2d 1036 (1997). CR 11 provides authority for an award of attorney fees as a sanction for filing pleadings for, among other things, the improper purpose of causing unnecessary delay. When the court finds it necessary to reset a trial date or grant a continuance, terms may be imposed upon the moving party at the court's discretion under CR 40(d) and (e). Some local court rules authorize an award of terms for violation of a case schedule order. See, e.g., Rivers, 145 Wn.2d at 685; Peluso v. Barton Auto Dealerships, Inc. 138 Wn. App. 65, 71-72, 155 P.3d 978 (2007).

Here we have a case where the conduct sanctioned—Shepherd's failure to timely deliver working copies to the trial judge—is not covered by the rules mentioned above. Ikegami does not cite, and we have not found, a specific statute or rule authorizing an award of attorney fees under the circumstances in this case. Ikegami contends that the award should be upheld on the basis of the court's inherent authority to control litigation. See State v. S.H., 102 Wn. App. at

473.

Under well-settled case law, a trial court's inherent authority to sanction litigation conduct by assessing attorney fees and costs is properly exercised only upon a finding of bad faith. S.H., 102 Wn. App. at 475; see also In re Recall of Pearsall-Stipek, 136 Wn.2d 255, 267, 961 P.2d 343 (1998). The United States Supreme Court permits a court to exercise its inherent power to award attorney fees against counsel for abusive litigation practices as an exception to the general rule that parties bear their own attorney fees, but a finding of bad faith is a precondition to such exercise. Roadway Exp., Inc. v. Piper, 447 U.S. 752, 765-67, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980). This court follows that rule. Wilson v. Henkle, 45 Wn. App. 162, 173-75, 724 P.2d 1069 (1986). Inherent powers must be exercised with restraint and discretion because they are "shielded from direct democratic controls," and therefore the inherent power to assess attorney fees against counsel exists only in "narrowly defined circumstances." Roadway Exp., 447 U.S. at 764-65.

Remand for further fact-finding is normally the appropriate remedy when the trial court does not support an attorney fee award under its inherent authority with a finding of bad faith. S.H., 102 Wn. App. at 475. Remand is not appropriate here for two reasons. First, Judge Allendoerfer declined to make a finding of bad faith despite being advised by both parties' briefs that such a finding was necessary for an exercise of inherent authority. Second, nothing in

the record would support a finding of bad faith as our cases have interpreted that term. Cf. S.H., 102 Wn. App. at 476.

We stated in S.H. that a party "may demonstrate bad faith by, inter alia, delaying or disrupting litigation." S.H., 102 Wn. App. at 475, citing Chambers v. NASCO, Inc., 501 U.S. 32, 46, 111 St. Ct. 2123, 115 L. Ed. 2d 27 (1991). Ikegami argues that the orders granting terms are tantamount to a finding of bad faith because they show that Shepherd's failure to follow rules and procedures caused delay and disruption of the litigation, and that Shepherd was unprofessionally blaming others for the fact that working copies did not reach the judge on time for the hearing of February 22.

The misconduct in this case—such as it was—would not support a finding of bad faith. In cases where attorney fees have been awarded as an exercise of inherent authority, the actor has affronted the court by engaging in willfully abusive, vexatious, or intransigent tactics designed to stall and harass. See, e.g., Chambers, 501 U.S. 32. This court has approved the exercise of inherent authority as a sanction against an attorney who fraudulently procured a judgment. Wilson, 45 Wn. App. 162. Shepherd's failure to use the proper mode of transmission when providing the judge with working papers caused a short trial interruption and extra work for opposing counsel, but the record contains no indication of vexatious troublemaking. Indeed, Judge Allendoerfer referred to Shepherd's nonconforming attempt to transmit working papers as a "procedural

glitch."

Judge Allendoerfer criticized Shepherd for complaining that the court had failed to inform him that the working copies did not arrive on time. But Shepherd's comments in responding to the motion for terms did not cause delay or extra expense, and there is no basis for inferring that Judge Allendoerfer regarded Shepherd's comments as an additional justification for the award of terms. The record shows no more than a dispute between the court and counsel about what was actually said at a hearing that was not transcribed.

We cannot conclude that either the "glitch" in the mailing of copies or the dispute about who caused it was tantamount to bad faith. In short, we find no basis in the record to justify an exercise of inherent authority.

We reverse the order awarding attorney fees against Ciocco under RCW 4.84.185, and we also reverse the order assessing terms against Shepherd Abbott Carter.

Becker, J.

WE CONCUR: